

**IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION**

CRIMINAL CASE NO. 1:05cr273

UNITED STATES OF AMERICA,)

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vs.

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DAVID HOWARD HUGHES.)

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ORDER

THIS MATTER is before the Court on the Defendant's *pro se* Application for Certificate of Appealability [Doc. 47] and Application to Proceed without Prepayment of Fees and Affidavit [Doc. 48].

On April 20, 2007, the Defendant was sentenced to 188 months imprisonment for his conviction of felony possession of a firearm. [Doc. 23]. His conviction and sentence were affirmed on direct appeal. United States v. Hughes, 255 Fed.Appx. 740 (4th Cir. 2007). In December 2008, the Defendant moved pursuant to 28 U.S.C. §2255 to vacate, correct or set aside his conviction and sentence. Hughes v. United States, Civil Case No. 1:08cv539. That motion was dismissed and the Defendant did not seek to appeal the dismissal. Hughes v. United States, 2009 WL 116977 (W.D.N.C.

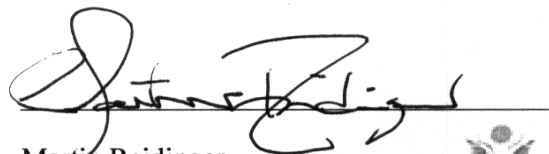
2009).

On October 19, 2009, the Defendant moved pursuant to 28 U.S.C. §1651 for a petition for a writ of *audita querela* in this case. [Doc. 43]. That motion was denied on April 30, 2010. [Doc. 44]. The Defendant now seeks leave to appeal the denial of that motion. The time within which to do so, however, has long since expired. Fed.R.App.P. 4(b)(1)(A)(i). Although the Defendant now claims his petition for a writ of *audita querela* was a form of habeas petition, in that motion he specifically stated that it was not. [Doc. 43, at 1]. Nor would the Court issue a certificate of appealability in any event since the Defendant has not made a substantial showing of the denial of a constitutional right and he failed to state the specific issues which make such a showing. 28 U.S.C. §2253(c)(2) & (c)(3).

IT IS, THEREFORE, ORDERED that the Defendant's *pro se* Application for Certificate of Appealability [Doc. 47] is hereby **DENIED**.

IT IS FURTHER ORDERED that the Defendant's *pro se* Application to Proceed without Prepayment of Fees and Affidavit [Doc. 48] is hereby **DENIED** as moot.

Signed: July 12, 2010


Martin Reidinger
United States District Judge

